May 21—Decision entered, Charles P. Smith, Div. 5.
July 13—Petition for review by U. S. Circuit Court of Appeals (5) with assignments of error filed by taxpayer.
July 13—Statement of evidence lodged.
July 20—Proof of service of petition for review filed.
July 20—Proof of service of statement and setting for hearing on July 30, 1936, filed.
July 20—Praecipe with proof of service thereon filed.
July 21—Objections to statement of evidence filed by General Counsel.
July 22—Notice of change of hearing to July 29, 1936.
July 27—Proof of service of objections filed by General Counsel.
July 29—Hearing had before Mr. McMahon on approval of statement of evidence. Record made and referred to Mr. Smith.
July 30—Order that petitioner's request for an approval of the statement of evidence lodged is hereby denied, entered.

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2 PETITION.

Filed April 3, 1935.

United States Board of Tax Appeals.

John H. Therrell, also known as J. H. Therrell,
Petitioner,
vs. Docket No. 78961.
Commissioner of Internal Revenue, Respondent.

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of

deficiency IT:AR:C-1 CGW-90D, dated February 14, 1935, and as a basis of his proceeding alleges as follows:

1. The petitioner is an individual residing at 503 Wenona Street in the City of Ocala, State of Florida, is a natural born citizen of the United States of America, and a citizen and resident of the State of Florida.

2. The notice of deficiency (a copy of which is attached and marked Exhibit A) was mailed to petitioner on February 14, 1935.

3. The taxes in controversy are income taxes for the calendar year 1931 for $108.78, and for the calendar year 1932 for $6333.63, total $6442.41, less amount assessed in 1932 of $4.10, leaving amount of deficiency $6438.31.

4. The determination of the tax set forth in the said notice of deficiency is based upon the following errors,—

a. That the Commissioner in determining the liability of petitioner for such tax, erred in holding and determining that the compensation or commission paid petitioner as Liquidator of the Bank of Bay Biscayne, a banking corporation, of Miami, Florida, was taxable income.

b. That the Commissioner in determining the liability of petitioner for such tax, erred in holding and determining that the compensation or commission paid petitioner as Liquidator of the Biscayne Trust Company, a banking corporation, of Miami, Florida, was taxable income.

c. That the Commissioner in determining liability of petitioner for such tax, erred in

holding and determining that the compensation or commission paid petitioner as Liquidator of the Guardian Trust Company, a banking corporation, of Miami, Florida, was taxable income.

d.. That the Commissioner in determining liability of petitioner for such tax, erred in holding and determining that the compensation or commission paid petitioner as Liquidator of the Trust Company of Florida, a banking corporation, of Miami, Florida, was taxable income.

e. That the Commissioner in determining liability of petitioner for tax in said years of 1931 and 1932, erred in finding and holding that the sums of money paid petitioner as Liquidator for the several institutions mentioned in assignments a, b, c and d respectively, was taxable income.

f. That the Commissioner in determining liability of petitioner for tax in said years 1931 and 1932, erred in not finding and holding that the sums of money paid petitioner as liquidator for the several institutions mentioned in assignments a, b, c and d respectively, was for money paid petitioner as an employee or officer of the State of Florida, and therefore not taxable.

5 g. That the basis of said findings of the Commissioner is the opinion of General Counsel, Memorandum 13488, stating it as his opinion that the appointment of a Liquidator or Receiver of Banks under the State Law, constituted such Liquidator an independent contractor, as distinguished from an employee, or officer, but the said decision was and is erroneous, because in direct conflict with the laws of the United States, and of the decisions of the final Appellate Courts of the United States, construing such laws.

h. That the findings and determination of tax liability of petitioner is contrary to law.

i. That the finding and determination of tax liability of petitioner is in conflict with the judicial determination of the matters passed upon, as determined by the United States Courts.

5. The facts upon which the petitioner relies as a basis of this proceeding are as follows:

a. The several assessments being based upon the identical state of affairs and arising under the same circumstances and conditions in each case, depends for their validity upon the same acts, to-wit: whether or not the said items are taxable as income, each and every of the same having been received by petitioner while acting as an employee or officer of the State of Florida, to-wit: as Liquidator appointed pur-
6 suant to the Laws of Florida of bank and trust companies in liquidation, that is to say,— petitioner admits receiving each of the said items in each of the said years, making the aggregate attempted to be assessed as deficiency for said years, but claims that said items are not taxable, but were and are exempt from taxation because he was,—

(1) Appointed by the Comptroller of the State of Florida on the 22nd day of July, 1930, to be the Liquidator of the Bank of Bay Biscayne, a State banking corporation doing business in Miami, Florida, and a part of the alleged income for each of said years was paid to him as compensation for his services to the State of Florida as Liquidator for said institution.

(2) Appointed by the Comptroller of the State of Florida on the 27th day of March, 1931, to be the Liquidator of the Biscayne Trust Company, a trust company doing business in Miami, Florida, and a part

of the alleged income for said years was paid to him as compensation for his services to the State of Florida as Liquidator for said institution.

7 (3) Appointed by the Comptroller of the State of Florida on the 9th day of May, 1931, to be the Liquidator of the Guardian Trust Company, a trust company doing business in Miami, Florida, and a part of the alleged income for each of said years was paid to him as compensation for his services to the State of Florida as Liquidator for said institution.

(4) Appointed by the Comptroller of the State of Florida on the 27th day of November, 1931, to be the Liquidator of the Trust Company of Florida, a trust company doing business in Miami, Florida, and a part of the alleged income for each of said years was paid to him as compensation for his services to the State of Florida as Liquidator for said institution.

8 b. The Comptroller of the State of Florida is a Constitutional officer of said State and is authorized by the Statute aforesaid, Section 19 of Chapter 13576, Laws of Florida, to make appointment of Liquidators of insolvent banks and trust companies, and is authorized by Section 21 thereof, to fix their compensation within certain limits; and such appointment being made and confirmed by the Court constituted the petitioner either an officer or employee of the State of Florida within the meaning of Section 213 of the Income Tax Law, under which said assessment is attempted to be made, being Section 954, U. S. C. A. and as is also provided for in Section 507 of the Revenue Act of 1928, now Section 1065-b U. S. C. A.

9 c. A copy of the respective appointments of the petitioner as Liquidator for the several institutions aforesaid, with a copy of the order of confirmation thereof, are hereto attached marked re-

spectively, Exhibits B, C, D and E, and the same are made a part hereof.

d. That during the entire period of his employment which began the 22nd day of July, 1930, and ending December 31, 1932, petitioner was continuously under the direction and control of the Comptroller of the State of Florida and subject at all times to his orders and directions, and that during said time he transacted no other business of importance, but gave his entire time to the performance of the duties cast upon him under the appointment by the Comptroller aforesaid, which appointment he accepted as above stated and performed the duties thereof cast upon him by virtue of his appointment by the Comptroller under the provisions of the statute aforesaid.

e. That the moneys received from the several trust companies and bank aforesaid by the petitioner as Liquidator of said several institutions, and now sought to be taxed as additional income, were paid by warrants drawn by the State Comptroller on the Treasurer of the State of Florida, and constituted payments by the State of Florida for said services.

f. Banking is an essential function of the State Government, said banks and trust companies being created and controlled by and through the State, and the Comptroller of the State has supervision and control over each and every bank; and all of said banks and trust companies are subject to the orders and directions of the Comptroller, and the liquidation of said banks is purely a state function and cannot be interfered with by Courts, either State of Federal. All of the funds arising from such liquidation are paid into the State Treasury, pursuant to statute laws of Florida, so that all banks and trust companies are essentially a part of the State Government and any payments

made for the services of a Liquidator are based upon state law, and the office of Liquidator after being once established has tenure, in that it continues either until such time as such bank or trust company is liquidated and wound up, or until its capital is repaired, its solvency established and its properties and effects returned to its stockholders; and during the time of such administration neither the stockholders nor officers of such corporation have any control, management, discretion or right in regard to its affairs, but all of said matters are administered strictly through the office of the Comptroller of the State of Florida, pursuant to the laws of said State.

g. That the basis upon which the said finding and determination of the deficiency set forth by the Commissioner of International Revenue in his notice of deficiency dated February 14, 1935, is erroneous and without legal basis, because the facts clearly established show that this petitioner was in fact an employee or officer of the State of Florida, duly appointed to such position by the Comptroller of the State of Florida, as authorized and provided for by the Statute laws of Florida; that by the said law the office of Liquidator is authorized and provided for, and upon the happening of the events mentioned in said Statute law, it becomes the duty of the Comptroller of the State of Florida to take possession of such institution, and to appoint some person to take charge of and administer the affairs of such institution; that such Liquidator is vested with the title to all of the assets of such institution, and may sue for and collect the debts of such institution including the liability of the stockholders as fixed by law; that it is only because such law creates and constitutes a liquidator of banks as an officer or agent of the State, or employee or agent of a State office, that the title to the effect of such institution, in liquidation, becomes so vested, because of which such statute in no

manner authorizes or creates the relation of a mere contractor, but provides for and contemplates continuity of service, subject to the direction of the Comptroller.

13 h. Petitioner further shows that there was a direct connection between the Bank of Bay Biscayne and the Biscayne Trust Company and the Guardian Trust Company in this,—that the Biscayne Trust Company was an affiliate organization or subsidiary of the Bank of Bay Biscayne, being owned by practically the same stockholders and in the greater part operated by the same officers and directors as the Bank of Bay Biscayne. That upon said institution becoming insolvent which took place a short time after the Bank of Bay Biscayne became insolvent, certain persons believing that they could work out the affairs of the Biscayne Trust Company, organized the Guardian Trust Company, and said Guardian Trust Company was appointed liquidator for said purpose. That later the said Guardian Trust Company also became affiliated with the City Trust Company, and having become involved in litigation with certain creditors of the said City Trust Company, it became impractical for said concern to go forward with its purpose; whereupon it was removed as liquidator, and petitioner was appointed in its place. That during the time of the liquidation in the hands of the Guardian Trust Company it had taken over certain trusts and properties in which the Bank of Bay Biscayne and the

14 Biscayne Trust Company were interested, and the greater part of the assets of said Guardian Trust Company consisted of properties taken over through this medium, but it still remained in liquidation and uncompleted. That said Guardian Trust Company shortly thereafter having become involved financially, and it having become necessary to appoint a liquidator under the laws of Florida, because of these relationships which grew out of said transactions, peti-

tioner was appointed as the liquidator of said Guardian Trust Company. That all of these matters centering around the affairs of the Bank of Bay Biscayne, and the Guardian Trust Company having become incapable of performing the trust for which it was organized, the same having been intended to be a mutual relationship between that and the liquidator of the Bank of Bay Biscayne, it was essential that the person liquidating and in charge of the liquidation of said Bank of Bay Biscayne be made the liquidator of said institutions, the Biscayne Trust Company and the Guardian Trust Company.

15 That the said Biscayne Trust Company at the inception of its liquidation, and it and the Guardian Trust Company at the time of the appointment of petitioner held a large number of hotels, apartment houses and business property which were being administered under the said trust, and the Bank of Bay Biscayne before its insolvency, had made advances and loans to a large number of said properties, so that there was owing to the Bank of Bay Biscayne large sums of money which it became necessary to follow through these trust companies, and the Bank of Bay Biscayne was also indebted to said Biscayne Trust Company. Because of which it was a matter of economy and of expediency to continue the relationships of these concerns through the same organization.

That the Trust Company of Florida which was generally known as a G. L. Miller organization, had no direct relationship with the Biscayne Trust Company, Bank of Bay Biscayne or the Guardian Trust Company, but had financed and was either indebted to or was handling a large number of properties such as hotels, apartment houses and business houses in the City of Miami. That the City of Miami had gone through and was going through at this time a

16 very hectic condition with reference to deflation in property values. That the said Trust

Company of Florida represented approximately 250 properties, all of which had been theretofore rented and handled through the said Trust Company of Florida. That the said Trust Company of Florida having become insolvent after the Biscayne Trust Company had become involved, and after this petitioner as Liquidator aforesaid, had reorganized the business of the Biscayne Trust Company and had begun to get the properties into producing shape, it was a matter of grave concern to appoint an outside third party to liquidate said institution and thereby permit the Liquidator of that institution to go into competition with the Liquidator of the trust compannies above mentioned, because if the property of the Trust Company of Florida was thrown on the market as distress property, it would produce such a result that all the properties of the Biscayne Trust Company would be jeopardized.

17 In addition to this the Trust Company of Florida was wholly without funds, and unless some arrangement could be made to operate its affairs cheaply and under some other organization, its properties probably would have been sacrificed and the creditors of said institution would have suffered untold loss; so that it was necessary in the liquidation of all of these matters that one central organization be set up so as to reduce the expense of operation and to operate said institution in connection with the above mentioned trusts of the Bank of Bay Biscayne, the Biscayne Trust Company and the Guardian Trust Company; for which reason this petitioner was appointed Liquidator of said Trust Company of Florida which had gone through at that time considerable litigation both in the State and Federal Courts with respect to the rights of the State or the Federal Government over it. That the greater part of the properties under said several trusts was in Miami and the vicinity of Miami, and under the said arrangement, although this petitioner held separate appointments of the

several trust companies aforesaid from that of the Bank of Bay Biscayne, all of the same were administered principally through the same clerical help and under the same supervision as a matter of
18 economy, and to prevent the sacrifice of the several properties for the reasons herein set forth.

That in addition to these reasons it was the practice of the Comptroller of the State of Florida to consolidate as far as possible the liquidation of different institutions so that the same clerical force with small exceptions, could be used for the administration of such several institutions. That the Trust Company of Florida had a large amount of property, but its business was of such a nature that very little revenue was then being produced for said company, and said company was hopelessly insolvent; so that at that time there was but little reason to believe there would be sufficient income from its properties immediately to set up a separate organization for liquidation. That an attempt had been made to take over the
19 same through the Federal Court, and a Federal Court Receiver had been appointed for a large number of its properties, but on appeal from that order the Circuit Court of Appeals reversed the District Court, and by the time the same was heard its business was in a chaotic condition, and it was essential that the same be thrown into some other liquidation to save expenses of a separate organization.

For all of these reasons the several institutions were administered by, through and under the supervision of this petitioner under the several appointments aforesaid so made by the Comptroller of the State of Florida.

20 i. Petitioner further says that in accordance with the several appointments hereinabove recited and referred to as Liquidator for the

several institutions aforesaid, he duly accepted each and every of said appointments, and in pursuance thereof did execute bond with surety payable to the Governor of Florida and his successors in office as provided by law, and did then and thereby become obligated as an official of the State of Florida and required to account to the State of Florida for all of his acts and doings as Liquidator of the several institutions aforesaid; and that as such Liquidator he did collect and receive moneys and property, and did turn over and deliver the said moneys so received to the State Treasurer of the State of Florida as required by law, and did account to the State of Florida and to the Comptroller of the State of Florida, as well as the Treasurer of the State of Florida, for all acts done and performed by him as Liquidator aforesaid.

21 j. And petitioner says that the effect of the several appointments by the Comptroller of the State of Florida, and approved by the Courts having jurisdiction over the same, constituted petitioner an officer or employee of the State of Florida, so that the compensation paid to him for his services as Liquidator for the several institutions was paid to him as an officer or employee of the State of Florida, and that there is no authority in law to tax compensation paid to an employee of the State of Florida, but such compensation is exempt from taxation by the United States of America.

22 Wherefore, petitioner prays that this Board may hear the proceedings and re-determine the liability of petitioner for the said deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency above mentioned, and will overrule, set aside and vacate the said findings, and decree and determine that the moneys so paid to petitioner as hereinabove set forth, be exempt to him and not subject to income tax as is found by the Commissioner

of Internal Revenue in the notice of deficiency aforesaid.

H. M. HAMPTON,
Counsel for Petitioner.

P. O. Box 830,
Ocala, Florida.

23 State of Florida,
County of Marion, ss.

John H. Therrell, also known as J. H. Therrell, being duly sworn, says that he is the petitioner above named; that he has read the foregoing petition, or had the same read to him, and is familiar with the statements contained therein, and that the facts stated are true, except as to those facts stated to be upon information and belief, and those facts he believes to be true.

JOHN H. THERRELL.

Subscribed and sworn to before me, this 25th day of March, 1935.

(Notarial Seal)

MIRIAM BRIDGES,
Notary Public, State of Florida at Large. My Commission expires Dec. 30, 1936.

24 EXHIBIT "A".

IT:AR:C-1 CGW-90D.

Feb. 14, 1935.

Mr. J. H. Therrell,
503 Wenona Street,
Ocala, Florida.

Sir:

You are advised that the determination of your income tax liability for the year(s) 1931 and 1932 dis-

closes a deficiency of $6,438.31 as shown in the statement attached.

In accordance with section 272 (a) of the Revenue Act of 1928 and section 272 (a) of the Revenue Act of 1932, as amended by section 501 of the Revenue Act of 1934, notice is hereby given of the deficiency mentioned. Within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency and will prevent the accumulation of interest, since the interest period terminates thirty days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,
GUY T. HELVERING,
Commissioner.
(Signed) By CHAS. T. RUSSELL,
Deputy Commissioner.

Enclosures:
Statement
Form 870.
CGW/HB-3.

25 STATEMENT.

IT:AR:C-1.
CGW-90D.

In re: Mr. J. H. Therrell,
503 Wenona Street,
Ocala, Florida.

Income Tax Liability.

Years	Income Tax Liability	Income Tax Assessed	Deficiency
1931	$ 108.78	None	$ 108.78
1932	6,333.63	$4.10	6,329.53
Totals	$6,442.41	$4.10	$6,438.31

Reference is made to Bureau letter dated January 15, 1935, advising you of the approval of the report submitted by the Internal Revenue Agent in charge at Jacksonville, Florida, a copy of which was transmitted to you under date of August 21, 1934. The records of the Bureau do not indicate that a reply has been received to that letter.

Careful consideration has been accorded your protest dated September 13, 1934, in connection with the findings of the examining officer, and the information submitted at conferences held in the office of the internal revenue agent in charge.

With respect to the question of whether or not the compensation received by you as liquidator for Florida State banks is subject to tax, your attention is invited to General Counsel's Memorandum 13488 published in Internal Revenue Bulletin XIII-35, page 9, in which it was held that the compensation of a taxpayer appointed by the state comptroller of Florida as liquidator of each bank liquidated is subject to federal in-

come tax. The action of the revenue agent in considering such income received by you as taxable is accordingly sustained.

Recomputation of Tax.

1931.

Net income shown on the return	$ 1,530.97
Plus: 1. Fees as bank liquidator	8,555.61
Total	$10,086.58
Less: 2. Error in addition on the return	.17
Adjusted net income	$10,086.41
Less: Personal exemption	3,500.00
Income subject to normal tax	$6,586.41
Tax at 1½% on $4,000.00	$ 60.00
Tax at 3% on $2,586.41	77.59
Surtax on $10,086.41	.86
Total tax	$ 138.45
Less: Credit for earned income	29.67
Net tax assessable	$ 108.78
Tax assessed	None
Deficiency	$ 108.78

Explanation of Changes.

1. Information on file discloses that you received fees totaling $8,555.61 as a bank liquidator, which amount was not reported as income. Your net income has been adjusted accordingly.

2. It is noted that the total of lines 13 to 18 on the return is $3,579.43 instead of $3,579.26. This adjustment reduces the net income by $.17.

Computation of Credit for Earned Income.

Earned net income	$9,455.61
Less: Personal exemption	3,500.00
Balance	$5,955.61
Tax at 1½% on $4,000.00	$ 60.00
Tax at 3% on $1,955.61	58.67
Total	$ 118.67
25% credit	$ 29.67

1932.

Net income shown on the return	$ 2,602.43
Plus: Fees as bank liquidator	39,448.07
Adjusted net income	$42,050.50
Less: Personal exemption	2,500.00
Income subject to normal tax	$39,550.50
Tax at 4% on $4,000.00	$ 160.00
Tax at 8% on $35,550.50	2,844.04
Surtax on $42,050.50	3,329.59
Net tax assessable	$ 6,333.63
Tax assessed	4.10
Deficiency	$ 6,329.53

Explanation of Changes.

Information on file, discloses that you received fees totaling $39,448.07 as a bank liquidator, which amount was not reported as income. Your net income has been adjusted accordingly.

A copy of this letter has been mailed to your representative, Mr. H. M. Hampton, Postoffice Box 830, Ocala, Florida, in accordance with the authority conferred upon him in the power of attorney executed by you and on file with the Bureau.

CGW/HB-3.

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28 EXHIBIT "B".

APPOINTMENT OF LIQUIDATOR.

Clerk's File F 20197.

Dated .....

Filed July 29, 1930.

Recorded in Deed Book 1395, page 1.

Comptroller's Office, State of Florida.

In Re: The Liquidation of Bank of Bay Biscayne, a corporation doing a banking business at Miami, Florida. File No. 13278-C.

Having become satisfied from the report of State Bank Examiner that the Bank of Bay Biscayne, a corporation duly chartered and authorized to do a banking business under the laws of the State of Florida at Miami, has become insolvent and is in default, I do hereby appoint J. H. Therrell as Liquidator of the said Bank of Bay Biscayne doing business at Miami, in the County of Dade, State of Florida, with all the usual powers and duties of a Liquidator by virtue of Section 19, Chapter 13576, Laws of Florida, for the purpose of closing out and winding up the affairs of the said Bank of Bay Biscayne upon the said J. H. Ther-

rell, executing and filing a bond in the usual form payable to Doyle E. Carlton, Governor of the State of Florida, and his successors in office in the penal sum of $50,000.00 to be approved by the Comptroller, as provided by law and the said Bank of Bay Biscayne being hereby directed to forthwith deliver all of its property of any nature whatsoever, real and personal, things in action, moneys, books, debts, legal and equitable and all property and effects of any nature and description whatsoever of said bank to the said Liquidator and the said Liquidator is hereby authorized and directed to be governed in all his acts and doings relative to said property by the laws of the State of Florida, and the ratification of the Comptroller and the orders of the Court, the said Liquidator being especially authorized to take immediate charge of said property of said bank upon the approval of the bond herein mentioned, and to proceed at once to collection of all amounts due to the said Bank of Bay Biscayne of Miami, Florida.

In testimony whereof, I have hereunto set my hand and official seal at the Capitol, Tallahassee, Florida, this July 21, 1930.

(Signed) ERNEST AMOS,
Comptroller State of Florida.

(Comptroller's Seal).

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29 To the Honorable Judge of the Circuit Court of the Eleventh Judicial Circuit State of Florida:

It appearing by the report of a State Bank Examiner that the Bank of Bay Biscayne of Miami was insolvent and unable to meet its liabilities, I did on July 21, 1930, appoint J. H. Therrell as Liquidator of said bank in pursuance of the provisions of Section 19 of Chapter

13576, Laws of Florida, a copy of said appointments being herewith attached; and did on July 21, 1930, address to James H. Gilman, President of the Bank of Bay Biscayne the following notice:

Mr. James H. Gilman, President,
Bank of Bay Biscayne,
Miami, Fla.

Dear Sir:

I did on July 21, 1930, appoint J. H. Therrell, as Liquidator of the Bank of Bay Biscayne of Miami, Florida, acting under and in pursuance of the provisions of Section 19, of Chapter 13576, Laws of Florida; and you are hereby notified that on July 28, 1930, or as soon thereafter as the same may be heard, I will apply to the Honorable ..... Judge of the Eleventh Judicial Circuit Court of Florida at Miami, Florida, for an order confirming my action in ascertaining that the Bank of Bay Biscayne of Miami, Florida, was and is insolvent and in appointing J. H. Therrell as Liquidator thereof.

Yours very truly,
(Signed) ERNEST AMOS,
Comptroller, State of Florida.

Appended hereto is the following petition:

I respectfully petition and apply to your Honor for a confirmation of my action in appointing J. H. Therrell as Liquidator of the Bank of Bay Biscayne, a corporation doing a banking business at Miami, Florida, and submit the attached affidavit of State Bank Examiner Geo. C. White, setting forth that at the time the said appointment was made, the said Bank of Bay Biscayne of Miami, Florida, was insolvent and in default and assuring Your Honor that should any other or further evidence be deemed necessary by you I am ready to comply with any request that you may make in the premises.

(Signed) ERNEST AMOS,
Comptroller, State of Florida.

Appended hereto is the following affidavit:

State of Florida,
County of Dade.

Before the undersigned a Notary Public in and for the State of Florida at Large, personally appeared Geo. C. White, who being first duly sworn says: that he is a State Bank Examiner and as such is the agent of the Comptroller of the State of Florida; in pursuance to instructions given him by the said Comptroller, he did make an examination of the Bank of Bay Biscayne of Miami, Florida, doing a banking business at said place, and that from said examination, according to his own knowledge in part and upon information and belief as to the remainder, the said affiant believes that the Bank of Bay Biscayne of Miami, Florida, is insolvent and unable to meet its obligations, and is now closed and in the hands of the Comptroller of the State of Florida.

(Signed) GEO. C. WHITE,
State Bank Examiner.

Sworn to and subscribed before me this June 14, 1930.

(Signed) EILEEN E. GRAHAM,
Notary Public State of Florida at Large. My Commission expires June 28, 1930.

(Notary Public Seal).

Appended hereto is the following Affidavit:

State of Florida,
County of Dade.

Before the subscriber, an officer authorized to administer oaths under the laws of the State of Florida, personally appeared James H. Gilman, who being duly sworn deposes and says: that he is the President of the Bank of Bay Biscayne of Miami, Florida, a corporation duly chartered and existing under the laws of the

State of Florida, to do a banking business and that on behalf of said bank he accepts service of notice of the Comptroller and waives further consideration in the matter of the appointment of J. H. Therrell, as Liquidator of the Bank of Bay Biscayne of Miami, Florida.

(Signed) JAMES H. GILMAN,
President.

Sworn to and subscribed before me this July 22, 1930.

(Signed) M. E. DENTON,
(N. P. Seal) Notary Public for the State of Florida at Large. My Commission expires December 6, 1932.

Note: This instrument filed July 26, 1930, and recorded in Circuit Court Minutes No. 52, Page 64, Public Records Dade County, Florida.

ORDER CONFIRMING APPOINTMENT OF LIQUIDATOR.

31 Clerk's File F 20202.

Dated .....

Filed July 29, 1930.

Recorded in Deed Book 1395 page 10.

In the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Flordia, in Chancery No. 13278-C.

Ernest Amos, Comptroller, State of Florida,
vs.
Bank of Bay Biscayne, Miami, Florida.

This cause coming on to be heard upon petition of Ernest Amos, Comptroller, of the State of Florida, for an order confirming the appointment of a liquidator for the Bank of Bay Biscayne of Miami, Florida, by the said Comptroller, and it appearing by evidence sub-

mitted that the said corporation is insolvent and that the president of said bank has waived further consideration and consented to the immediate appointment of a liquidator as aforesaid, and the Court being fully advised in the premises;

It is thereupon ordered, adjudged and decreed that the appointment of a liquidator for the said Bank of Bay Biscayne of Miami, Florida, by the Comptroller of the State, is hereby approved and confirmed, and the said Liquidator is hereby vested with all the powers conferred upon receivers or liquidators for banks, under the laws of the State of Florida, subject to the restrictions contained in such laws.

Done and ordered at Chambers at Fort Lauderdale, Florida, this July 25, 1930.

(Signed) GEO. W. TEDDER,
Circuit Judge Pro haec vice.

This instrument was filed for record July 26, 1930 and recorded in Circuit Court Minute Book 52 page 59, Public Records of Dade County, Florida.

CERTIFICATE OF QUALIFICATION OF LIQUIDATOR.

32 Clerk's File G 15287.

Filed July 27, 1931.

Recorded in Deed Book 1450 page 25.

In the Circuit Court of the Eleventh Judicial Circuit of Florida in and for Dade County, at Law No. 13278.

In the Matter of:
Liquidation of the Bank of Bay Biscayne.

This is to certify that I, Ernest Amos, Comptroller, of the State of Florida, acting under and in pursuance

of the authority vested in me by law, did on the 21st day of July A. D. 1930, appoint J. H. Therrell, as Liquidator for the Bank of Bay Biscayne of Miami, Florida, and I further certify that the said J. H. Therrell has executed his bond in the form and amount required by his appointment, which said bond has been filed with and approved by me as Comptroller of the State of Florida as provided by law.

In Testimony Whereof I have hereunto set my hand and official seal at the Capitol at Tallahassee, Florida, this 10th day of July A. D. 1931.

(Signed) ERNEST AMOS,
Comptroller of the State of Florida.

(Official Seal)

33 EXHIBIT "C".

Appointment of Liquidator.

Clerk's File F 20301.

Dated .....

Filed July 30, 1930.

Recorded in Deed Book 1395 page 143.

In the Circuit Court of the Eleventh Judicial Circuit in and for Dade County Florida. At Law No. 13282.

In Re: The Liquidation of the Biscayne Trust Company, a corporation doing business at Miami, Florida.

Having become satisfied from the report of the State Bank Examiner that the Biscayne Trust Com-

pany of Miami, Florida, a corporation duly organized and authorized to conduct a banking business under the laws of the State of Florida, at Miami, Florida, has become insolvent and is unable to meet its obligations, I do hereby appoint the Guardian Trust Company, of Miami, Florida, in the County of Dade, State of Florida, with all the usual powers and duties of Liquidators for the purpose of closing up the affairs of the Biscayne Trust Company, of Miami, Florida, and the said Biscayne Trust Company, being hereby directed to forthwith deliver all of its property of any nature whatsoever, real and personal, things in action, moneys, books, debts, legal and equitable, and all property and effects of any nature and description whatsoever of said bank to the said Liquidator and the said Liquidator being next hereby authorized and directed to be governed in all its acts and doings relative to said property by laws of the State of Florida and the directions of the Comptroller and the orders of the Court, the said Liquidator being especially authorized to take immediate charge of said property of said bank, and to proceed at once to the collection of all amounts due to the said Biscayne Trust Company of Miami, Florida.

In Testimony Whereof, I have hereunto set my hand and official seal at the Capitol at Tallahassee, this July 25, 1930.

(Signed) ERNEST AMOS,
Comptroller, State of Florida.

(Official Seal).

Comptroller's Office, State of Florida.

To the Honorable Judge of the Circuit Court of the Eleventh Judicial Circuit, State of Florida:

It appearing by the report of a State Bank Examiner that the Biscayne Trust Company of Miami, was insolvent and unable to meet its liabilities, I did on July 25, 1930, appoint the Guardian Trust Company, as

Liquidator of said bank, in pursuance of the provisions of Section 19, of Chapter 13576, Laws of Florida, a copy of said appointment being herewith attached, and did on July 25, 1930, address to Jas. H. Gil-
34 man, President, of the Biscayne Trust Company, Miami, Florida, the following notice:

Mr. Jas. H. Gilman, President,
Biscayne Trust Company,
Miami, Florida.

Dear Sir:

I did on July 25, 1930, appoint the Guardian Trust Co., as Liquidator of the Biscayne Trust Company of Miami, Florida, acting under and in pursuance of the provisions of Section 19, of Chapter 13576, laws of Florida, and you are hereby notified that on July 31, 1930, or as soon thereafter as the same may be heard, I will apply to the Honorable Judge of the Eleventh Judicial Circuit of Florida, at Miami, Florida, for an order confirming my action in ascertaining that the Biscayne Trust Company of Miami, Florida, was and is insolvent and in appointing Guardian Trust Company, as Liquidator thereof.

Yours very truly,
(Signed) ERNEST AMOS,
Comptroller, State of Florida.

State of Florida,
County of Dade.

Before the undersigned, a Notary Public, in and for the State of Florida, at Large, personally appeared Geo. C. White, who being first duly sworn, says: That he is a State Bank Examiner, and as such is the agent of the Comptroller of the State of Florida, that in pursuance to instructions, given him by the said Comptroller, he did make an examination of the Biscayne Trust Company of Miami, Florida, doing a banking business at said place, and that from said examination according to his own knowledge in part and upon in-

formation and belief, as to the remainder, the said affiant believes that the Biscayne Trust Company, of Miami, Florida, is insolvent and unable to meet its obligations, and is now closed and in the hands of the Comptroller of the State of Florida.

(Signed) GEO. C. WHITE,
State Bank Examiner.

Sworn to and subscribed before me this July 25, 1930.

(Signed) PAULINE CORLEY,
(N. P. Seal) Notary Public, State of Florida at Large. Commission expires November 19, 1930.

Comptroller's Office, State of Florida.

I respectfully petition and apply to Your Honor for a confirmation of my action in appointing the Guardian Trust Company, as Liquidator of the Biscayne Trust Company, a corporation, doing a banking business at Miami, Florida, and submit the attached affidavit of State Bank Examiner, George C. White, setting forth that at the time the said appointment was made, the said Biscayne Trust Company, of Miami, Florida, was insolvent, and in default, and assuring Your Honor that should any other or further evidence be deemed necessary by you I am ready to comply with any request that you may make in the premises.

(Signed) ERNEST AMOS,
Comptroller, State of Florida.

State of Florida;
County of Dade.

Before the subscriber, an officer authorized to administer oaths under the laws of the State of Florida, personally appeared Jas. H. Gilman who being duly sworn deposes and says: that he is the President of the Biscayne Trust Company of Miami, Florida, a corporation duly chartered and existing under the laws of

the State of Florida, to do a banking business and that on behalf of said bank he accepts service of notice of the Comptroller and waives further consideration in the matter of the appointment of ..... Liquidator of the Biscayne Trust Company, of Miami, Florida.

(Signed) JAMES H. GILMAN,
President.

Sworn to and subscribed before me this July 28, 1930.

(Signed) PAULINE CORLEY,
Notary Public State of Florida at Large. Commission expires November 19, 1930.

(Notary Public Seal.)

ORDER CONFIRMING APPOINTMENT OF LIQUIDATOR.

Clerk's File F 20300.

Dated .....

Filed July 30, 1930.

Recorded in Deed Book 1395 page 142.

In the Circuit Court of the Eleventh Judicial Circuit in and for Dade County Florida. No. 13282.

Ernest Amos, Comptroller, State of Florida,
vs.
Biscayne Trust Company, Miami, Florida.

This cause coming on to be heard upon petition of Ernest Amos, Comptroller, of the State of Florida, for an order confirming the appointment of a liquidator for the Biscayne Trust Company, of Miami, Florida, by the said Comptroller, and it appearing by evidence submitted that the said Corporation is insolvent and

that the President of said Bank has waived
36 further consideration and consented to the immediate appointment of a Liquidator, as aforesaid, and the Court being fully advised in the premises;

It is thereupon ordered, adjudged and decreed that the appointment of a liquidator for the said Biscayne Trust Company of Miami, Florida, by the Comptroller of the State, is hereby approved and confirmed and the said liquidator is hereby vested with all the powers conferred upon receivers or liquidators for banks under the laws of the State of Florida subject to the restrictions contained in such laws.

Done and ordered at Chambers at 29th, Florida, this the 29th day of July, A. D. 1930.

(Signed) ULY O. THOMPSON,
Circuit Judge.

Note: This instrument was recorded July 29, 1930, in Circuit Court Minutes No. 52, page 91, Public Records of Dade County, Florida.

RESIGNATION OF LIQUIDATOR AND APPOINTMENT OF SUCCESSOR LIQUIDATOR.

Filed March 31, 1931.

Recorded in Circuit Court Minute Book 56 page 482.

In Re: Liquidator Biscayne Trust Company.

In the Circuit Court of the Eleventh Judicial Circuit of Florida in and for Dade County. Common Law. No. 13282.

In Re: The Liquidation of The Biscayne Trust Company, a corporation doing business at Miami, Florida.

It appearing that The Guardian Trust Company, heretofore the duly appointed and qualified Liquidator

of the Biscayne Trust Company of Miami, Florida, having tendered its resignation, and it further appearing that it is for the best interest of the Biscayne Trust Company of Miami, that a successor be appointed to the aforesaid Guardian Trust Company, Liquidator, resigned; therefore I, Ernest Amos, Comptroller of the State of Florida, acting under and in pursuance of the authority vested in me by law do hereby accept the resignation of the said Guardian Trust Company, as Liquidator of the Biscayne Trust Company of Miami, Florida, and hereby direct that, upon qualification of its successor by giving bond, the said Guardian Trust Company, shall immediately transfer and deliver to its successor, J. H. Therrell, who this day has
37 been appointed as Liquidator to succeed the said Guardian Trust Company, all of the property of every kind and description in its possession or under its control or anywise belonging to or pertaining to the said Biscayne Trust Company of Miami, Florida, for which it has been acting as Liquidator. And I further direct that the said Guardian Trust Company, Liquidator, make up and deliver to its successor, J. H. Therrell, a full and complete statement of all the assets and liabilities and of all the property of any kind and description belonging to the Biscayne Trust Company of Miami, Florida.

In Testimony Whereof, I have hereunto set my hand and official seal at the Capitol, at Tallahassee, Florida, this the 27th day of March, A. D. 1931.

ERNEST AMOS,

(Official Seal) Comptroller, State of Florida.

Appointment of Liquidator.

Whereas, it was deemed advisable and for the best interest of the Biscayne Trust Company, of Miami, Florida, to accept the resignation of the Guardian Trust Company, as Liquidator of such Trust Company and

to appoint a successor as Liquidator, who was appointed by me under authority granted by the provisions of Section 4166 of the Revised General Statutes of Florida, I do hereby appoint J. H. Therrell, as Liquidator for the Biscayne Trust Company of Miami, Florida, upon the said J. H. Therrell, executing and filing a bond in the usual form payable to Doyle E. Carlton, Governor of the State of Florida, and his successor in office in the penal sum of $25,000.00, and the bond to be approved by the Comptroller, as provided by law; and the said Guardian Trust Company of Miami, Florida, is hereby directed to forthwith deliver all of its property of any nature whatsoever, real and personal, things in action, moneys, books, debts, legal and equitable, and all its property and effects of any nature and description whatsoever to the said Liquidator, and the said Liquidator, J. H. Therrell is hereby authorized and directed to be governed in his acts and doings relative to said property by the laws of the State of Florida, and the directions of the Comptroller and the orders of the Court, and the said Liquidator being especially authorized to take immediate charge of said property of said Trust Company upon his giving bond herein mentioned, and to proceed at once to collect all accounts due to said trust money.

In Testimony Whereof, I have hereunto set my hand and official seal at the Capitol, at Tallahassee, Florida, this the 27th day of March, A. D. 1931.

ERNEST AMOS,

(Official Seal) Comptroller, State of Florida.

38 EXHIBIT "D"

Appointment of Liquidator.

Clerk's File No. G11170.

Filed May 26, 1931.

Recorded in Deed Book 1440 Page 549.

In the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida, Common Law No. 13986.

In Re: The Liquidation of the Guardian Trust Company, a corporation doing a banking business at Miami, Florida.

Having become satisfied from the report of State Bank Examiner that the Guardian Trust Company, a corporation duly chartered and authorized to do a banking business under the laws of the State of Florida at Miami, Florida, has become insolvent and is in default, I do hereby appoint J. H. Therrell as Liquidator of the said Guardian Trust Company doing business at Miami, Florida, in the County of Dade, State of Florida, with all the usual powers and duties of a Liquidator by virtue of Section 19, Chapter 13576, Laws of Florida, for the purpose of closing out and winding up the affairs of the said Guardian Trust Company upon the said J. H. Therrell executing and filing a bond in the usual form payable to Doyle E. Carlton, Governor of the State of Florida, and his sucessors in office in the penal sum of Thirty Thousand Dollars ($30,000.00) to be approved by the Comptroller, as provided by law and the said Guardian Trust Company being hereby directed to forthwith deliver all of its property of any nature whatsoever, real and personal, things in action, moneys, books, debts,

legal and equitable and all property and effects of any nature and description whatsoever of said Guardian Trust Company to the said Liquidator and the said Liquidator is hereby authorized and directed to be governed in all his acts and doings relative to said property by the laws of the State of Florida, and the ratification of the Comptroller and the orders of the Court, the said Liquidator being especially authorized to take immediate charge of said property of said bank upon the approval of the bond herein mentioned, and to proceed at once to collection of all amounts due to the said Guardian Trust Company of Miami, Florida.

In Testimony Whereof, I have hereunto set my hand and official seal at the Capitol, Tallahassee, Florida, this the 9th day of May, A. D. 1931.

(Signed) ERNEST AMOS,
(Official Seal) Comptroller, State of Florida.

39 Comptroller's Office State of Florida.

To the Honorable Judge of the Circuit Court of the Eleventh Judicial Circuit: State of Florida:

It appearing by the report of a State Bank Examiner that the Guardian Trust Company of Miami, Florida, was insolvent and unable to meet its liabilities, I did on the 9th day of May, A. D. 1931, appoint J. H. Therrell as Liquidator of said Bank in pursuance of the provisions of Section 19, of Chapter 13576, Laws of Florida, a copy of said appointment being herewith attached; and did on the 9th day of May A. D. 1931 address to Morgan S. McCormick, President of the Guardian Trust Company the following notice:

Mr. Morgan S. McCormick, President,
Guardian Trust Company,
Miami, Florida.

Dear Sir:

I did on the 9th day of May A. D. 1931, appoint J. H. Therrell as Liquidator of the Guardian Trust

Company of Miami, Florida, acting under and in pursuance of the provisions of Section 19, of Chapter 13576, Laws of Florida, and you are hereby notified that on the 14th day of May A. D. 1931, or as soon thereafter as the same may be heard, I will apply to the Honorable ..... Judge of the Eleventh Judicial Circuit Court of Florida at Miami, Florida, for an order confirming my action in appointing a Liquidator thereof.

Yours very truly,
(Signed) ERNEST AMOS,
Comptroller, State of Florida.

Comptroller's Office State of Florida.

I respectfully petition and apply to Your Honor for a confirmation of my action in appointing a Liquidator for the Guardian Trust Company, a Corporation doing a banking business at Miami, Florida, and submit the attached affidavit of State Bank Examiner A. W. Saarinen setting forth that at the time the said appointment was made, the said Guardian Trust Company of Miami, Florida, was in default and believed to be insolvent, and assuring Your Honor that should any other or further evidence be deemed necessary by you I am ready to comply with any request that you may make in the premises.

(Signed) ERNEST AMOS,
Comptroller, State of Florida.

Before The Undersigned, a Notary Public in and for the State of Florida at Large, personally appeared A. W. Saarinen, who being first duly sworn says: that he is a State Bank Examiner and as such is the agent of the Comptroller of the State of Florida; that in pursuance to instructions given him by the said Comptroller, he did make an examination of the Guardian Trust Company of Miami, Florida, doing a banking and trust business at said place, and that from said

examination, according to his own knowledge in part and upon information and belief as to the remainder, the said affiant believes that the Guardian Trust Company of Miami, Florida, is insolvent and unable to meet its obligations, and is now closed.

(Signed) A. W. SAARINEN,
State Bank Examiner.

Sworn To And Subscribed before me this the 9th Day of May A. D. 1931.

(Signed) ANNA W. CLAPP,
Notary Public, State of Florida at Large. My commission expires Mar. 15, 1933.

(Notary Public Seal).

41 State of Florida,
County of Dade.

Before The Subscribed, an officer authorized to administer oaths under the laws of the State of Florida, personally appeared Morgan S. McCormick, who being duly sworn deposes and says: that he is the President of the Guardian Trust Company of Miami, Florida, a corporation duly chartered and existing under the laws of the State of Florida, to do a banking and trust business and that on behalf of said bank, he accepts service of notice of the Comptroller and waives further consideration in the matter of the appointment of J. H. Therrell as Liquidator of the Guardian Trust Company of Miami, Florida.

(Signed) MORGAN S. McCORMICK,
President.

Sworn To And Subscribed Before me this the 11th day of May A. D. 1931.

(Signed) RHONA MIXON,
Notary Public, State of Florida at Large. My commission expires Jan. 15, 1932.

(Notary Public Seal).

ORDER CONFIRMING APPOINTMENT OF LIQUIDATOR.

42 Clerk's File No. G.11171.

Filed May 26, 1931.

Recorded in Deed Book 1441 Page 1.

In the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida, Common Law No. 13986.

In Re: The Liquidation of the Guardian Trust Company, a corporation doing a banking business at Miami, Florida.

This cause coming on to be heard upon petition of Ernest Amos, Comptroller of the State of Florida for an order confirming the appointment of a Liquidator for the Guardian Trust Company of Miami, Florida, by the said Comptroller, and it appearing by evidence submitted that the said Corporation is insolvent and that the President of said bank has waived further consideration and consented to the immediate appointment of a Liquidator, as aforesaid, and the Court being fully advised in the premises:

It is further ordered, adjudged and decreed that the appointment of a Liquidator for the said Guardian Trust Company of Miami, Florida, by the Comptroller of the State is hereby approved and confirmed and the said liquidator is hereby vested with all the powers conferred upon receivers or liquidators for banks under the laws of the State of Florida subject to the restrictions contained in such laws.

Done And Ordered at Chambers at Miami, Florida, this the 22 day of May A. D. 1931.

(Signed) ULY O. THOMPSON,
Circuit Judge.

43 ORDER.

Filed May 26, 1931.

Recorded in Deed Book 1441, page 3.

Clerk's File No. G11172.

In the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida, Common Law No. 13986.

In Re: The Liquidation of the Guardian Trust Company, a corporation doing a banking business at Miami, Florida.

On this the 23rd day of May A. D. 1931, there appeared before the Court Lilburn R. Railey, William H. Burwell, and H. H. Taylor, as amicus curie, and called the Court's attention to that certain rule to show cause heretofore issued by the Supreme Court of the State of Florida, to-wit: The 20th day of May, A. D. 1931, in that certain cause therein pending, to-wit: The State of Florida, ex rel, Cary D. Landis, Attorney General, Relator, versus The Circuit Court for the Eleventh Judicial Circuit of Florida, H. F. Atkinson, Circuit Judge of the Eleventh Judicial Circuit of Florida, Will Allen and Henry Taylor, Respondents; and it appearing from an inspection of said rule to show cause that same is, among other things, directed to "The Circuit Court for the Eleventh Judicial Circuit of Florida", and the Court having inspected and being advised as to the contents of said writ of prohibition, thereupon, orders, adjudges and decrees as follows, to-wit: First: That the order heretofore entered by this Court in the matter of The Guardian Trust Company on, to-wit: The 22nd day of May, A. D. 1931, confirming the appointment of J. H. Therrell, as Liquidator of said Guardian Trust Company, be, and the same

is hereby vacated, annulled, and set aside, the Court being of the opinion at this time that the confirmation of said J. H. Therrell, as said Liquidator, was in violation of the rule to show cause hereinbefore referred to; and, to the ontry of this order, Carl T. Hoffman appearing for the said J. H. Therrell, and Ernest Amos, Comptroller, hereby excepts.

Done And Ordered in Chambers at Miami, Florida, on this 23rd day of May A. D. 1931.

(Signed) ULY O. THOMPSON,
Circuit Judge.

PETITION OF ERNEST AMOS, COMPTROLLER OF THE STATE OF FLORIDA FOR AN ORDER CONFIRMING THE APPOINTMENT OF A LIQUIDATOR OF GUARDIAN TRUST COMPANY.

44 Filed July 11, 1931.

In the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida, Common Law No. 13986.

In Re: The Liquidation of the Guardian Trust Company, a corporation doing a banking business at Miami, Florida.

Now comes Ernest Amos, as Comptroller of the State of Florida and petitions this Court to approve and confirm the appointment by the said Ernest Amos as Comptroller of the State of Florida of a Liquidator for the Guardian Trust Company, a corporation heretofore doing business under the Banking and Trust laws of the State of Florida, said appointment of a Liquidator of said institution and the proceedings in-

cident thereto and connected therewith more fully appearing from the record in this cause on file in this Court.

(Signed) CARL T. HOFFMAN,
Counsel for Ernest Amos,
Comptroller of the State
of Florida.

ORDER CONFIRMING APPOINTMENT OF LIQUIDATION FOR GUARDIAN TRUST COMPANY.

45 Clerk's File No. G14835.

Filed July 20, 1931.

Recorded in Deed Book 1449, page 91.

In the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida, Common Law No. 13986.

In Re: The Liquidation of the Guardian Trust Company, a corporation doing a banking business at Miami, Florida.

This cause coming on to be heard upon petition of Ernest Amos, Comptroller of the State of Florida, for order confirming the appointment by the said Comptroller of a Liquidator of The Guardian Trust Company, of Miami, Florida, and it appearing to the Court by the evidence submitted that the said appointment of a Liquidator of the said The Guardian Trust Company is regular, lawful and proper, and that the said The Guardian Trust Company having by its President waived further consideration or notice of this application and consented to the appointment of a Liquidator

for said institution, and it appearing to the Court that an Order of this Court confirmed the appointment of a Liquidator of this institution was made by this Court on the 22nd day of May, A. D. 1931, and that said Order of this Court of May 22, 1931, was vacated and set aside by the Order of this Court of May 23, 1931, upon the theory that said Order of May 22, 1931, was prematurely entered for the reasons recited in the Order of this Court of May 23, 1931;

And it now appearing to this Court that the appointment of a Liquidator for The Guardian Trust Company should now be confirmed in view of the decision and judgment of the Supreme Court of the State of Florida in the case of State of Florida, Ex Rel. Cary D. Landis, Attorney-General, Relator vs. Circuit Court of the Eleventh Judicial Circuit of Florida, et als. Respondents;

46 Now, Therefore, upon consideration of the petition of the said Ernest Amos, as Comptroller of the State of Florida for the confirmation of the appointment by the said Ernest Amos as Comptroller of the State of Florida of a Liquidator for said The Guardian Trust Company, it is

Considered, Ordered, Adjudged and Decreed that the appointment by Ernest Amos, as Comptroller of the State of Florida of J. H. Therrell, as Liquidator for the said The Guardian Trust Company, of Miami, Florida, be and the same is hereby approved and confirmed, and the said Liquidator so appointed by the said Comptroller is hereby vested with all the powers conferred upon Liquidators for banks and trust companies under the Laws of the State of Florida, subject to the restrictions contained in such laws.

Done And Ordered in Miami, Dade County, Florida, this 11th day of July, A. D. 1931.

(Signed) ULY O. THOMPSON,
Circuit Judge.

47 EXHIBIT "E".

No. 1.

In the Circuit Court of the Eleventh Judicial Circuit of Florida in and for Dade County. No. 14286.

In Re: Liquidation of Trust Company of Florida, a corporation doing a trust business at Miami, Florida.

It appearing by the report of a State Bank Examiner that The Trust Company of Florida of Miami, Florida was in an unsound condition, I did on the 27th day of November, A. D. 1931, appoint J. H. Therrell, as Liquidator of said Trust Company in pursuance of the provisions of Section 19 of Chapter 13576, Laws of Florida, a copy of said appointment being herewith attached; and did on the 27th day of November, A. D. 1931, address to Mr. J. V. Hardeman, Vice-President of the Trust Company of Florida, the following notice:

Mr. J. V. Hardeman, Vice-President,
Trust Company of Florida,
Miami, Florida.

Dear Sir:

I did on the 27th day of November, A. D. 1931, appoint J. H. Therrell as Liquidator of the Trust Company of Florida, of Miami, Florida, acting under and in pursuance of the provisions of Section 19 of Chapter 13576, Laws of Florida, and you are hereby notified that on the Third day of December, A. D. 1931, or as soon thereafter as the same may be heard, I will apply to the Honorable Judge of the Eleventh Judicial Circuit Court of Florida, at Miami, Florida, for an order confirming my action in ascertaining that the Trust Company of Florida of Miami, Florida, was in an unsound condition and in appointing J. H. Therrell as Liquidator thereof.

Yours very truly,
(Signed) ERNEST AMOS,
Comptroller, State of Florida.

48 Comptroller's Office—State of Florida.

I respectfully petition and apply to Your Honor for a confirmation of my action in appointing a Liquidator for Trust Company of Florida, a Corporation doing a banking business at Miami, Florida, and submit the attached affidavit of State Bank Examiner, L. E. Fenn, setting forth that at the time the said appointment was made the said Trust Company of Florida of Miami, Florida, was in an unsound condition and assuring your Honor that should any other or further evidence be deemed necessary by you, I am ready to comply with any request that you may make in the premises.

ERNEST AMOS,
Comptroller State of Florida.

Appointment of Liquidator.

Having become satisfied from the report of State Bank Examiner that the Trust Company of Florida, of Miami, Florida, a corporation duly chartered and authorized to do a trust business under the laws of the State of Florida, is in an unsound condition I do hereby appoint J. H. Therrell, Liquidator of the said Trust Company of Florida, doing business at Miami, Florida, with all the usual powers and duties of a Liquidator by virtue of Section 19, Chapter 13576, Laws of Florida, for the purpose of closing out and winding up the affairs of the Trust Company of Florida upon the said J. H. Therrell executing and filing a bond in the usual form payable to Doyle E. Carlton, Governor of the State of Florida, and his successors in office in the penal sum of Twenty-five Thousand Dollars ($25,000) to be approved by the Comptroller as provided by law and the said Trust Company of Florida being hereby directed to forthwith deliver all of its property of any nature whatsoever, real and personal, things in action, money, books, debts, legal and equit-

able and all property and effects of nature and description whatsoever of said bank to the said Liquidator and the said Liquidator is hereby authorized and directed to be governed in all his acts and doings relative to said property by the laws of the State of Florida and the ratification of the Comptroller and the orders of the Court, the said Liquidator being especially authorized to take immediate charge of said property of said Bank upon the approval of the bond herein mentioned and to proceed at once to collection of all amounts due to the said Trust Company of Florida, of Miami, Florida.

In Testimony Whereof I have hereunto set my hand and official seal at the Capitol, Tallahassee, Florida, this the 27th day of November A. D. 1931.

ERNEST AMOS,

(Seal) Comptroller, State of Florida.

49 Before The Undersigned, a Notary Public in and for the State of Florida at Large, personally appeared L. E. Fenn, who being first duly sworn says: that he is a State Bank Examiner and as such is the agent of the Comptroller of the State of Florida; that in pursuance to instructions given him by the said Comptroller he did make an examination of the Trust Company of Miami, Florida, doing a trust business at said place and that from said examination according to his own knowledge in part and upon information and belief as to the remainder the said affiant believes that the Trust Company of Florida, of Miami, Florida is in an unsound condition by reason of litigation now pending against the company which litigation would probably render the Company unable to meet its obligations; and the said Trust Company of Florida, is now closed and in the hands of the Comptroller of the State of Florida.

L. E. FENN,

State Bank Examiner.

Sworn to and subscribed before Notary Public of Florida, Nov. 27, 1931. Seal affixed. Commission expires: April 11, 1934.

State of Florida,
County of Dade.

Before the subscribed officer authorized to administer oaths under the laws of the State of Florida, personally appeared J. V. Hardeman, Vice-President, who being duly sworn, deposes and says: that he is the vice-president of the Trust Company of Florida, of Miami, Florida, a corporation chartered and existing under the laws of the State of Florida, to do a trust business and that on behalf of said Trust Company, he accepts service of notice of the Comptroller and waives further consideration in the matter of the appointment of J. H. Therrell, as Liquidator of the Trust Company of Florida, of Miami, Florida.

J. V. HARDEMAN,
Vice-President.

Sworn to and subscribed before a Notary Public of Florida, December 3, 1931. Seal Affixed. Commission expires; July 17, 1934.

Note: The above instrument, Item No. 2, was filed for record December 8, 1931, recorded in Circuit Court Minute Book 62, page 179, recorded December 8, 1931, in Chancery Order Book 254, page 407 and re-recorded December 9, 1931 in Deed Book 1467, page 287.

50 No. 2.

Same Cause,
Same Court.

This cause coming on before this Court to be heard pursuant to Section 6102 of the Compiled General Laws of Florida for the confirmation of the act of the

Comptroller in appointing a liquidator for the Trust Company of Florida, and it has been made to appear by oral representatives to the Court that there is a certain suit pending in the Federal Court for the appointment of a receiver for said Trust Company of Florida and that by reason thereof this Court should defer confirming the act of the comptroller in appointing a liquidator until the said Federal Court suit has been finally determined upon the basis of commity between the Courts but it appearing unto this Court that the comptroller is now in possession of said Trust Company of Florida and that even after confirmation of his act in appointing a liquidator that such would not deprive any Court of its jurisdiction and that even in the event of the appointment of a receiver by the Federal Court after the confirmation of the act of appointing a liquidator by the comptroller it would then become the duty of the administrative officer to yield to the jurisdiction of such or any Court in the proper exercise of its jurisdiction and it further appearing that the act of the comptroller should be confirmed;

It Is Considered; Ordered And Adjudged that an order be entered accordingly.

Done And Ordered at Miami, Florida this 8th day of December, A. D. 1931.

PAUL D. BARNES,
Circuit Judge.

Note: The above instrument Item No. 3 was recorded December 8, 1931 in Circuit Court Minute Book 62, page 184, recorded December 8, 1931 in Chancery Order Book 254, page 412 and recorded December 9, 1931 in Deed Book 1467, page 286 of the Public Records of Dade County, Florida.

No. 3.

Order Confirming Appointment of Liquidator.

Same Cause,
Same Court.

This cause coming on to be heard upon petition of Ernest Amos, Comptroller of the State of Florida, for an order confirming his action and (or in) the appointment of a liquidator for the Trust Company of Florida, of Miami, Florida, by the said Comptroller and it appearing that the said corporation is in an unsound condition and that the Vice-President of the said Trust Company for and on behalf of said company has waived further consideration in the matter of appointment of a liquidator as aforesaid and the Court being fully advised in the premises;

51

It is therefore Considered, Ordered, Adjudged and Decreed that the action of said Amos, as comptroller as aforesaid and (or in) the appointment of a liquidator for the said Trust Company of Florida of Miami, Florida, by the Comptroller of the State is hereby approved and confirmed.

Done and ordered at Chambers at Miami, Florida, this 8th day of December A. D. 1931.

PAUL D. BARNS,
Circuit Judge.

Note: The above instrument, Item No. 4, was recorded December 8, 1931, in Circuit Court Minute Book 62, page 185, re-recorded December 8, 1931 in Chancery Order Book 254, page 413 and re-recorded December 9, 1931, in Deed Book 1467, page 292 of the Public Records of Dade County, Florida.

52 ANSWER.

Received May 7, 1935.

Filed May 7, 1935.

(Title Omitted.)

The Commissioner of Internal Revenue, by his attorney, Robert H. Jackson, Assistant General Counsel for the Bureau of Internal Revenue, in answer to the petition of the above-named taxpayer, admits and denies as follows:

1 and 2. Admits the allegations contained in paragraphs 1 and 2 of the petition.

3. Admits so much of paragraph 3 of the petition as alleges that the taxes in controversy are income taxes for the calendar years 1931 and 1932, and denies all other allegations contained in said paragraph 3.

4. Denies that the respondent, in determining the deficiency tax, committed errors as alleged in paragraph 4 of the petition.

5. Admits so much of paragraph 5 of the petition as alleges that the petitioner was appointed Liquidator of certain banks by Comptroller of the State of Florida; that he received fees as shown in the deficiency notice, for services rendered; and denies the remaining allegations contained in said paragraph 5.

53 6. Denies each and every allegation contained in the petition not hereinbefore specifically admitted or denied.

Wherefore it is prayed that the determination of the Commissioner be approved.

(Signed) ROBERT H. JACKSON,
Assistant General Counsel for the Bureau of Internal Revenue.

Of Counsel:

C. A. RAY,
Special Attorney, Bureau of Internal Revenue.

CAR/y 5/6/35.

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54 MEMORANDUM OPINION.

United States Board of Tax Appeals.

John H. Therrell, also known as J. H. Therrell, Petitioner, v. Commissioner of Internal Revenue, Respondent.

Docket No. 78961.

H. M. Hampton, Esq., for the petitioner.

C. A. Ray, Esq., for the respondent.

SMITH:

This proceeding involves deficiencies in petitioner's income tax for 1931 and 1932 in the amounts of $108.78 and $6,329.53, respectively, all of which deficiencies are in dispute.

The only question in issue is whether the compensation received by the petitioner during the taxable years for his services as bank liquidator under appointment by the Comptroller of the State of Florida is exempt from Federal income tax.

The petitioner was appointed liquidator of the Bank of Bay Biscayne, a State banking institution of the

State of Florida, located at Miami, Florida,
55 in July, 1920. At that time he was employed as president of a bank at Ocala, Florida. Thereafter, he was appointed liquidator of several other similar institutions within the State. The appointment of liquidators to administer insolvent banking institutions by the Comptroller of the State is authorized by the statutes of Florida. See section 19, chapter 13576 (1929) or 4162 Revised General Statutes, 6102 Compiled General Laws.

The petitioner in assuming his duties as liquidator received no commission from the Governor of the State and took no oath of office. He was appointed by and served entirely at the pleasure of the Comptroller. He was required to give bond in each of the undertakings.

As liquidator the petitioner's duties were to look after the Court litigation involving the liquidating banks and to dispose of their assets to the best advantage of the depositors and others concerned. He exercised supervision over a number of other persons employed in various capacities to assist in the liquidation of the several banks and was himself under the direct supervision of the Comptroller. He devoted all of his working time to these duties in both the years 1931 and 1932 except for occasions when he would attend directors' meetings of the bank at Ocala of which he was still president on an inactive status, and the bank paid the cost of his transportation to and from the directors' meetings.

The amount of the petitioner's compensation for his services in liquidating the several institutions was determined and paid to him by the Comptroller on a commission basis not in excess of five per cent of the amounts collected by him and turned in to the State treasury. He received small amounts from time to time on warrants issued by the Comptroller and upon

the completion of each liquidation received the balance due him under the final accounting. His total compensation from this source amounted to $8,555.61 in 1931 and $39,448.07 in 1932.

56 Whether these amounts are exempt from Federal income tax on the constitutional ground that the imposition of the tax would result in a forbidden interference by the Federal government with the State of Florida in the exercise of an essential governmental function is the only question here in issue. See *McCulloch* v. *State of Maryland, et al.*, 4 Wheat. 316; *The Collector* v. *Day* 11 Wall. 113, and cases following.

On the facts in this proceeding the question presented is not materially different from that decided by the Board in *Carl Newman Davis*, 26 B. T. A. 1007. We there held that the constitutional exemption from taxation did not apply to compensation received by the taxpayer for legal services rendered in liquidating certain insolvent State banking institutions under direction of the Superintendent of Banks of the State of Georgia.

The numerous cases bearing on this question are not entirely harmonious. A majority of those cases, however, support the view which we have adopted here that the taxpayer was an independent contractor and that the proposed tax would not result in any serious impairment of the State's governmental functions.

In *Metcalf & Eddy* v. *Mitchell*, 269 U. S. 514, the Court said:

"It is on this principle that, as we have seen, any taxation by one government of the salary of an officer

of the other, or the public securities of the other, or an agency created and controlled by the other, exclusively to enable it to perform a governmental function (*Gillespie* v. *Oklahoma, supra*), is prohibited. But here the tax is imposed on the income of one who is neither an officer nor an employee of government and whose only relation to it is that of contract, under which there is an obligation to furnish service, for practical purposes not unlike a contract to sell and deliver a commodity. In such a situation it cannot be said that the tax is imposed upon an agency of government in any technical sense, and the tax itself cannot be deemed to be an interference with government, or an impairment of the efficiency of its agencies in any substantial way. *Railroad Co. v. Peniston; Gromer v. Standard Dredging Co.; Baltimore Shipbuilding Co. v. Baltimore; Fidelity & Deposit Co. v. Pennsylvania; Choctaw, O. & G. R. R. Co. v. Mackey, supra.*"

57 In our opinion the imposition of the proposed tax on the compensation which the petitioner received on a percentage basis out of the monies recovered by him for assisting the State Comptroller in the liquidation of the banking institutions does not place a prohibited burden upon the State of Florida in the exercise of its governmental functions. See also *Helvering v. Powers*, 293 U. S. 214; *Gardner Abbott*, 30 B. T. A. 227; *Emory R. Buckner*, 31 B. T. A. 84, affd., 77 Fed. (2d) 297; *Commissioner v. Murphy*, 70 Fed. (2d) 790; *George Z. Medalie*, 30 B. T. A. 1284; *D. F. Strickland*, 32 B. T. A. 804.

Judgment will be entered for the respondent.

Enter: Entered May 21, 1936.

58 DECISION.

United States Board of Tax Appeals Washington.

John H. Therrell, also known as J. H. Therrell, Petitioner,
v. Docket No. 78961.
Commissioner of Internal Revenue, Respondent.

Pursuant to the determination of the Board, as set forth in its Memorandum Opinion entered May 21, 1936, it is

Ordered and Decided: That there are deficiencies of $108.78 and $6,329.53 for the years 1931 and 1932, respectively.

Enter: Entered May 21, 1936.
(Signed) CHARLES P. SMITH,
(Seal) Member.

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59 PETITION FOR REVIEW.

Filed July 13, 1936.

(Title Omitted.)

The petition of John H. Therrell, also known as J. H. Therrell, hereinafter called petitioner, respectfully shows:

I. Petitioner is an individual, citizen of the United States, residing at Ocala, Florida, and filed his federal income tax return for the calendar years 1931 and 1932 with the United States Collector of Internal Revenue at Jacksonville, Florida, whose collection

district is within the jurisdiction of the United States Circuit Court of Appeals for the Fifth Circuit.

60 Nature of Controversy.

II. The controversy which petitioner desires to have reviewed arises out of respondent's disallowance of certain sums of money paid to petitioner as compensation for services rendered by him as Liquidator for one certain bank and three certain trust companies in Miami, Florida, during the years 1931 and 1932 respectively, as hereinafter stated, which moneys petitioner claims were exempt to him as compensation paid a state officer or employee, and as such were exempt from federal income taxes.

Before the said Board of Tax Appeals petitioner alleged and showed, and the Board found as facts, that petitioner was (1) appointed by the Comptroller of the State of Florida on July 22, 1930, to be Liquidator of the Bank of Bay Biscayne, a state banking corporation doing business in Miami, Florida; (2) appointed by the Comtroller of the State of Florida on March 27,
61 1931, to be Liquidator of the Biscayne Trust Company, a trust company doing business in Miami, Florida; (3) appointed by the Comptroller of the State of Florida on May 9, 1931, to be Liquidator of the Guardian Trust Company, a trust company doing business in Miami, Florida; (4) appointed by the Comptroller of the State of Florida on November 27, 1931, to be Liquidator of the Trust Company of Florida, a trust company doing business in Miami, Florida.

That the amount of petitioner's compensation for his services in liquidating the several institutions was paid to him by the Comptroller of Florida on a commission basis not in excess of 5% of the amounts collected by him and turned over to the State Treasurer.

That his total compensation in 1931 was $8555.61, and in 1932 was $39,448.07.

Upon this finding the Board of Tax Appeals held that petitioner was an independent contractor as distinguished from an employee of the State of Florida, and that the proposed tax would not result in impairment of the state's governmental functions, and then and there denied the petitioner's request for redetermination and entered judgment thereon for the respondent.

62 III. Your petitioner, being aggrieved by the findings of fact, opinion, decision and order of the Board of Tax Appeals of date May 21, 1936, and the judgment entered thereon as aforesaid, petitions for a review of said decisions and order by the United States Circuit Court of Appeals for the Fifth Circuit, and as grounds for said review, alleges that the Board in rendering its decision, and in entering its final order, committed the following errors:

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63 ASSIGNMENTS OF ERROR.

1. The Honorable Board of Tax Appeals erred in finding that because this petitioner held no commission and took no oath of office, and was appointed by and served at the pleasure of the Comptroller of the State of Florida, and the amounts paid him were upon the commission basis, said sums of money were taxable for the respective years in which the same were received.

2. The Honorable Board of Tax Appeals erred in finding and decreeing that the petitioner was an independent contractor, and that the proposed tax would not result in any serious impairment of the State's governmental functions.

3. The Honorable Board of Tax Appeals erred in decreeing and determining that the sums of money paid to petitioner for the year 1931 as compensation for his services for the several institutions mentioned, were taxable as income.

4. The Honorable Board of Tax Appeals erred in decreeing and determining that the sums of money paid to petitioner for the year 1932 as compensation for his services for the several institutions mentioned, were taxable as income.

64 Wherefore, petitioner prays that the order and decision of the United States Board of Tax Appeals be reviewed by the United States Circuit Court of Appeals for the Fifth Circuit; that a transcript of the record therein be prepared in accordance with the law and the rules of said Court and transmitted to the clerk of said Court for filing; and that appropriate action be taken to the end that the errors herein complained of may be reviewed and corrected by said Court.

(S.) H. M. HAMPTON,
Attorney for Petitioner.

P. O. Box 830,
Ocala, Florida.

65 State of Florida,
County of Marion.

H. M. Hampton, being duly sworn, says that he is Attorney of record for John H. Therrell, also known as J. H. Therrell, petitioner herein, and as such is duly authorized to verify the above and foregoing petition for review to the United States Circuit Court of Appeals for the Fifth Circuit; that he has read said petition for review and is familiar with the statements therein contained, and that the same are true to the best of his knowledge and belief.

(S.) H. M. HAMPTON.

Sworn to and subscribed before me, this 10th day of July, 1936.

(S.) MIRIAM BRIDGES,
Notary Public State of Florida at Large.

(Seal)

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66 Filed July 20, 1936.

(Title Omitted.)

To the Clerk of the United States Board of Tax Appeals:

You will please prepare, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, copies duly certified as correct of the following documents and records in the above entitled cause in connection with a petition for review by the United States Circuit Court of Appeals for the Fifth Circuit filed by John H. Therrell, also known as J. H. Therrell.

67 1. The docket entries of proceedings before the Board.

2. Pleadings before the Board.

3. Findings of fact, opinion and decision of the Board.

4. Petition for review.

5. The statement of evidence.

6. This praecipe.

(S.) H. M. HAMPTON,
Attorney for Petitioner.

Service of the foregoing praecipe and a copy of the petition is hereby acknowledged this 13th day of July, 1936.

(S.) HERMAN OLIPHANT,
Attorney for Respondent.

68 ORDER.

(Title Omitted.)

In connection with the appeal from the decision of the Board in the above-entitled proceeding entered May 21st, 1936, to the United States Circuit Court of Appeals for the Fifth Circuit, petitioner, on July 13, 1936, lodged with this Board a proposed "Statement of the Evidence" for approval by the Board. On July 21, 1936, counsel for the respondent filed objections to the statement of evidence and on July 27, 1936, a "Notice of Objections to Statement of Evidence." In his objections to the statement of evidence filed July 21, 1936, counsel for the respondent states—"it is respectfully shown that the petition for review filed in this case neither assigns error as to the admission or rejection of evidence nor that a finding of the Board is unsupported by any evidence."

Upon an examination of the record the contentions of the respondent are found to be correct. Under Rule II which has been adopted by all the United States Circuit Courts of Appeal and the Court of Appeals for the District of Columbia the petitioner is not entitled to a statement of evidence. Wherefore, it is—

Ordered that petitioner's request for an approval of the statement of evidence lodged is hereby denied.

(Signed) CHARLES P. SMITH,
(Seal) Member.

Dated: July 30, 1936.

CPS:aa.

69 CERTIFICATE.

United States Board of Tax Appeals Washington.

John H. Therrell, also known as J. H. Therrell, Petitioner,
v. Docket No. 78961.
Commissioner of Internal Revenue, Respondent.

I, B. D. GAMBLE, clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 68, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 13th day of August, 1936.

B. D. GAMBLE,
Clerk, United States Board of Tax Appeals.

(Seal)

That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:—

Argument and submission

Extract from the Minutes of February 1st, 1937

No. 8212

JOHN H. THERRELL, ALSO KNOWN AS J. H. THERRELL

vs.

COMMISSIONER OF INTERNAL REVENUE

On this day this cause was called, and, after argument by H. M. Voorhis, Esq. for petitioner, and Howard P. Locke, Esq., Special Assistant to the Attorney General, for respondent, was submitted to the Court.

March 9, 1937

Before FOSTER, SIBLEY, and HUTCHESON, Circuit Judges

SIBLEY, Circuit Judge: An additional tax was assessed by the Commissioner and sustained by the Board of Tax Appeals against John H. Therrell for the years 1931 and 1932 because of income received by him in those years as liquidator of a number of Florida banks and trust companies. Only question is whether the Federal Constitution prohibits taxation by the United States of this income earned in the service of the State of Florida. The Board held that Therrell was neither officer nor employe of the State of Florida but an independent contractor whose compensation was taxable, relying directly on Davie, et al., 26 B. T. A. 1007, and Metcalf & Eddy vs. Mitchell, 269 U. S. 514.

We judicially notice the statutes of Florida and their provisions for the establishment of banks and trust companies, for their supervision and for their winding up. Comp. Gen. Laws, Secs. 6053 and following, and especially Secs. 6102, 6102 (1), 6104, 6105, relating to liquidators. The State Comptroller when a bank or trust company is found insolvent or threatened with insolvency, or is in an unsound condition or violating the banking laws, "may appoint a liquidator to take charge of the assets and affairs of such bank and require of him such bond and security as the Comptroller deems proper * * * and such liquidator shall be subject to dismissal by the Comptroller. Such liquidator, under the direction and supervision of the Comptroller, shall take possession of the books and records and assets of every description of such bank * * * and in his name shall sue for and collect all debts and claims belonging to it, and upon the order of the court of competent jurisdiction may sell or compound all bad or doubtful debts and on like order may

sell all the real and personal property * * * and sue for and enforce the individual liability of the stockholders. Such liquidator shall pay all money received by him to the State Treasurer to be held as a special deposit * * * and shall make quarterly reports, or when called upon, to the Comptroller." The appointment is, after notice to the bank, confirmed by the Circuit Court. The expenses of liquidation are paid out of the fund in the Treasurer's hands. "The compensation of the liquidator shall be fixed by the Comptroller and shall be based upon the amount of work actually and necessarily performed, and shall in no case exceed five percent of the cash collected." Therrell was appointed liquidator of a number of banks, and gave substantially all his time to the work. He had no commission from the Governor and took no oath of office, but he had formal appointments by the Comptroller under his official seal confirmed by the court, and gave a bond for his faithful conduct touching each bank approved by the Comptroller.

The case of Davie et al cited by the Board, was of attorneys at law who under leave of a statute were employed by the Georgia Superintendent of Banks to do certain legal work touching failed banks, their duties and compensation being entirely matters of private agreement. The conclusion reached that they were independent contractors, mere lawyers practicing their profession though having a public officer as a client, is well supported by the cases of Lucas vs. Howard, 280 U. S. 526, and Lucas vs. Reed, 281 U. S. 690. Metcalf & Eddy vs. Mitchell involved in much the same way consulting engineers. But such is not the case here. The liquidator does not contract with the Comptroller for a desired result, nor do they fix by agreement the liquidator's duties or compensation. The Comptroller appoints him to a public position created by law with duties and responsibilities fixed by law and guaranteed by a bond, and with a compensation also regulated by law. There is a formal commission signed, not by the Governor but by another high State officer. The work to be done includes collecting and suing, but extends to rehabilitation of the bank if possible and to conserving and safeguarding its assets in every way, and if finally insolvent to distributing its assets in conjunction with the Comptroller. He becomes the representative not of the bank or its creditors but of the Comptroller, the instrument of the State for executing its banking laws and doing justice to the bank's creditors and stockholders in its liquidation. He is not chosen by the bank or its creditors, but over their heads. It is superficial to say that they pay him. The State by its officer does that out of the bank's money, not by the consent of the bank or its creditors but by the State's power, an exaction not unlike the levying of a tax for the purpose. He has no contract rights with anyone, for the Comptroller may remove him at any time. All he does is under the direction and subject to the revision of the Comptroller. In Florida Bank & Trust Co. vs. Yaffey, 102 Fla. 723, 136 So. 399, it is said: "A bank liquidator of this

State under the statute providing for his appointment and controlling his duties is a representative and agent of the Comptroller and is not an officer of the court." He takes title to the assets and though the Comptroller has complete power over him a judgment against the liquidator binds the Comptroller. Amos, Comp. vs. Powell, 108 Fla. 139, 146 So. 195. This court said in Amos vs. Trust Co. of Florida, 54 Fed. (2d) 123, "Like the receiver of a national bank, the liquidator though confirmed by a court is not an officer of the court but the representative of the Comptroller." His appointment, powers, and compensation are in complete analogy to those of a national bank receiver under 12 U. S. C. A., Secs. 67, 191, 192. Of such a receiver it was said in Ex parte Chetwood, 165 U. S. 443, 458: "The receiver was not the officer of any court but the agent and officer of the United States"; and in Auten vs. United States, 174 U. S. 125, 141, "A receiver of a national bank appointed by the Comptroller of the Currency is an officer of the United States" as respects the jurisdiction of a federal court. In United States vs. Weitzel, 246 U. S. 533, 541, the court asserts: "The receiver, unlike a president, director, cashier, or teller, is an officer not of the corporation but of the United States. As such he gives to the United States a bond for the faithful discharge of his duties; pays to the Treasurer of the United States moneys collected; and makes to the Comptroller reports of his acts and proceedings. Being an officer of the United States, he is represented in court by the United States attorney subject to the supervision of the Solicitor of the Treasury. And because he is such officer a receiver has been permitted to sue in the federal court regardless of citizenship or the amount in controversy." The function of a national bank receiver could not be taxed by a State by taxing his compensation, and no more can the function of the State bank liquidator be taxed in the same way by the United States.

The classic demonstration that a banking system is a fiscal instrumentality of the national Government which cannot constitutionally be taxed by a State is found in McCullough vs. Maryland, 4 Wheat. 315. The classic counterpart is found in The Collector vs. Day, 11 Wall. 113, where it is shown that the governmental instrumentalities of the States are similarly not taxable by the United States. The taxation of a State judge's salary, though under a general law, was held to be a taxation of his employment as judge, and therefore of the State's administration of justice. These statements of the law have never been departed from or improved upon. Their argument is that the powers of the national and State governments are separated and balanced in the federal Constitution and cannot be used to impede or destroy one another; a constitutional State function is to be protected from aggression equally with a national function; that taxation if allowed on one instrumentality might by the same logic be extended to all; that taxation as to its amount knows no limit except the discretion of the taxing power; so the power to tax

involves the power to destroy. The conclusion is that no taxation at all by one government of the governmental functions and instrumentalities of the other without the latter's consent can safely be allowed or be regarded as constitutional.[1] In this limited field the rule stated is well established, is sound in logic and wise in application. Under it officers and employees of one government cannot generally be taxed by the other on their office or on their compensation. But if the function involved be not really governmental but commercial, as in taking over for operation a business enterprise, the manager though created a public officer is taxable on his income. Helvering vs. Powers, 293 U. S. 214. In Metcalf & Eddy vs. Mitchel, 269 U. S. 514, 522, it is said the immunity extends to "those agencies through which either government immediately and directly exercises its sovereign powers. Thus the employment of officers who are agents to administer its laws * * * is so intimately connected with the necessary functions of government as to fall within the established exemption; and when the instrumentality is of that character the immunity extends not only to the instrumentality itself but to income derived from it." We are of opinion that the establishment and supervision and orderly winding up of State banks is a true governmental function of the State, resting not only on its fiscal needs and powers but also on its police power. The winding up involves also the governmental power of administering justice to its citizens. The bank liquidator, though not a public officer in the full sense, is a public official and an instrumentality appointed by the State to aid directly both in the administration of its banking laws and to do justice to those interested in a failed bank. He takes up where the Comptroller leaves off, and does what the Comptroller, if he had time, might well do himself. The Comptroller, indeed, retains such authority that the liquidator is justly said to be his representative. The liquidator cannot by the United States be taxed on his employment to any extent. If anything is taken from him as tax he would lack that much of receiving what the State law allows him. Compare Dobbins vs. Erie County, 16 Pet. 434, where the compensation of the captain of a United States revenue cutter was involved, and Hoskins vs. Commissioner, 84 Fed. (2d) 627, where the salary of a superintendent of a State public school cafeteria was sought to be taxed. The tax assessed here cannot constitutionally be sustained. The judgment is reversed with direction to eliminate it.

Reversed.

HUTCHESON, Circuit Judge, dissenting:

The view of the majority that to tax petitioner in respect of the compensation he received from the banks he liquidates is to invade and impair the sovereignty of Florida, seems to me illogical and

[1] State taxation of national bank shares is a case of such consent. Baltimore National Bank vs. Tax Commission, 297 U. S. 209.

unreal. Illogical and unreal because by law his compensation is to be, it is in fact, paid not by the State from its own funds, but by each bank he liquidates and from the funds of that bank. I recognize the existence and binding force of the holding that to tax officers and employees of a State actually employed in conducting, or in connection with the conduct of, its governmental functions in respect of their compensation as salaries or wages paid them by the state from its own funds is to burden the state. I realize that it would be vain now to protest that ruling. Texas Co. vs. Carmichael, 13 F. Supp. 247. I think it plain however that the decisions which so hold have pressed the doctrine of governmental immunity to its very verge. To extend the protection of that doctrine as here proposed to one who is neither an officer of the state nor its employee, but a mere agent at the will of or contractee with the Comptroller is, I think, not only without the support of a single authority but contrary to the very reason of the doctrine invoked. That reason, that the state must be free from interference in the exercise of its sovereign powers and that if its officers and agents are subject to be taxed in respect of the compensation it pays them, the state is no longer sovereign but subject, may support the exemption from Federal taxation where the salaries are charged upon and are paid from state funds. It certainly, I think, does not support the exemption of the compensation paid by banks to their liquidators out of their own funds, any more than it exempts the salaries, wages, and so forth, paid to the officers, agents, and employees of the bank who are employed or retained in its service by and under the liquidator.

I do not believe my associates would extend the exemption this far. I have difficulty in making flesh of one and fowl of the other when all are engaged to the same end, in liquidating the bank, and all are under the same general supervision and control of the state Comptroller. It will avail nothing to point out that the supervision and liquidation of banks is a governmental function and the Comptroller, an officer of the state, discharging that function. The liquidator is not an officer of, he draws no salary from, the state. He merely undertakes for and under the appointment of a Comptroller, as a court receiver does for and under the appointment of a court, to handle specific matters of conservation and liquidation when appointed to do so. It will serve no purpose to cite or discuss the great number of authorities according or denying exemption on varying states of facts. It is sufficient to say they all agree upon the principle that where the effect of the tax upon the state is regarded as immediate and direct there is immunity; where it is regarded as remote and indirect there is none. Illustrative cases discussing the principle and assembling the authorities are: Helvering vs. Powers, 293 U. S. 214; Burnot vs. Jergins, 288 U. S. 501; Metcalf & Eddy vs. Administratix, 269 U. S. 514; Register vs. Commissioner, 69 F. (2d) 607; Fox Film Corp. vs. Doyal, 286 U. S. 123; Liggett & Meyers vs. U. S. — U. S. —, decided January 4, 1937.

I think the Board rightly denied the exemption. Their decision and order should stand. I dissent from the reversal.

Judgment

Extract from the Minutes of March 9th, 1937

No. 8212

JOHN H. THERRELL, ALSO KNOWN AS J. H. THERRELL

vs.

COMMISSIONER OF INTERNAL REVENUE

This cause came on to be heard on the petition of John H. Therrell, also known as J. H. Therrell, for a review of a decision of the United States Board of Tax Appeals, and was argued by counsel;

On consideration whereof, it is now here ordered, adjudged and decreed by this court, that the judgment of the said United States Board of Tax Appeals in this cause be, and the same is hereby, reversed, with direction to eliminate the contested tax.

Hutcheson, Circuit Judge, dissenting.

Clerk's certificate

United States of America

United States Circuit Court of Appeals, Fifth Circuit

I, Oakley F. Dodd, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 60 to 70 next preceding this certificate contain full, true, and complete copies of all the pleadings, record entries, and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 8212, wherein John H. Therrell, also known as J. H. Therrell is petitioner, and Commissioner of Internal Revenue is respondent, as full, true, and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 59 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said United States Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 24th day of May A. D. 1937.

[SEAL]

OAKLEY F. DODD,
Clerk of the United States Circuit Court of Appeals, Fifth Circuit.

U. S. GOVERNMENT PRINTING OFFICE: 1937

Order following certiorari

Filed October 11, 1937

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice BLACK took no part in the consideration and decision of this application.

U. S. GOVERNMENT PRINTING OFFICE: 1937